SUPERINTENDENT OF LANDS AND SURVEYS DEPARTMENT SIBU DIVISION & ANOR AND ANOTHER APPEAL

v.

USANG LABIT & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEALS NO: Q-01-138-03-2012
& Q-02-661-03-2012]
18 DECEMBER 2013

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Provisional lease on land - Whether subject to native title - Whether affected and covered native customary land - Status as natives of Sarawak - Whether proven - Whether encroached area identified - Claim for native customary rights - Whether bona fide - Whether in dispute - Land area cleared for cultivation - Whether covered land area in dispute - Recognition of rights by Government - Whether claim proved upon balance of probabilities*

This was an appeal by the appellants against the fourth respondent ('the respondent'). The respondent represented himself and the residents of his longhouse, Rumah Siew, where a suit was filed in the High Court against the appellants in relation to a breach of the respondent's native customary rights ('NCR') over a piece of land ('the land'). The High Court dismissed the claim by the first respondent and judgment was granted in favour of the fourth respondent. No specific orders were granted or made against the second and third respondents. The orders sought, *inter alia,* were, (i) a declaration that the respondent had native title and/or native customary rights over the entire area of Lot 13; (ii) a declaration that the first appellant in Civil Appeal No. Q-02-661-03-2012, *ie,* Rosebay Enterprise Sdn Bhd and/or its servants or agents had trespassed upon the respondent's native customary land; and (iii) a declaration that the lease of state land for Lot 13 by the first and second appellants in Civil Appeal No. Q-01-138-03-2012, *ie,* the Superintendent of Lands and Surveys Department Sibu Division and the Government of the State of Sarawak respectively, was subject to the respondent's native title and/or native customary rights in or over the native customary

land. It was alleged that the provisional lease of Lot 13 affected and covered the respondent's native customary land. The issues that arose for consideration herein were in relation to: (a) the identification of the area of the alleged encroachment into the land over which the NCR land was claimed; (b) the *bona fides* of the claim to the NCR right; (c) whether the particular NCR right relied upon was a right to the land over which the right was exercised; and (d) where relevant, what was the NCR right to land that could be acquired. It was argued that Rumah Siew and the cleared and cultivated area were outside and some kilometres away from Lot 13.

Held (dismissing appeal)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The map showed that Lot 13 was largely within the claimed NCR land. The encroached area was clearly identified in the statement of claim to be in the lower part of the land area over which NCR was claimed. The Ibans are a race native to Sarawak. Although the respondent was put to strict proof, he had come forward and the challenge was abandoned. It was fair to infer that since the respondent came forward, held a Malaysian identity card and was not challenged, his assertion that he and the residents he represented were Iban and natives of Sarawak was accepted. Once it was shown that they were Ibans and natives of Sarawak, their claim to the native customary rights was not inherently incredible. (paras 16, 20 & 21)

(2) The *temuda* of an Iban longhouse comprised of cleared area under cultivation ("tanah umai") and lands left to fallow after cultivation, and the term "pemakai temuda" includes "pulau galau" (*Director of Forest Sarawak & Anor v. TR Sandah Tabau & Ors*; refd). The aerial photographs showed that up to 1966, Lot 13 remained under forest cover, and in the absence of evidence to the contrary, it was safe to accept the area comprised in Lot 13 remained under forest cover until it was leased to the first appellant, Rosebay Enterprise Sdn Bhd. Since "pulau galau" was an area maintained under forest cover in order to harvest, collect or otherwise obtain forest products, the respondent's claim that the area in Lot 13 was part of their "pulau galau" was not inconsistent with the official aerial photographs produced by the appellants. (paras 27, 33 & 34)

(3) The location of the claimed "pulau galau" area within which Lot 13 was located was not inconsistent with the claim since the "pulau galau" area was adjacent to the cleared and cultivated areas. The appellants did not produce any evidence to contradict these claims and evidence. Further, without the land, the native customary right of the use of "pulau galau" could no longer be exercised. (paras 34 & 38)

(4) The appellants failed to adduce any evidence that the respondents did not exercise any rights under the custom of "pulau galau" or that any rights they exercised thereon was not inextricably wrapped and tied up with the land. Thus, the claim to the land in Lot 13 based upon the native custom of "pulau galau" was a claim of a native customary right to land and the claim had been proved upon a balance of probabilities. (paras 39 & 40)

(5) Native customary rights to acquire land had at all times been recognised and the State undertook to protect the natives' rights to do so. The rights guaranteed by the State under the Constitution in respect of native rights must be carried out by the Government of the State. The Government must therefore determine and where valid, recognise the NCR rights of the natives of the State. A land without apparent habitation is not necessarily State land and must be subject to native customary rights previously acquired thereon and the native customary right to the land that can be acquired at any point of time must be in accordance with the law at the time the right was acquired. (paras 41 - 43)

(6) The respondent had discharged the burden that was placed upon him under the Evidence Act 1950, that occupation began in the 1800s, at a time when no limitations on the acquisition of native customary rights existed because of the various orders, circulars and the Sarawak Land Code 1958 had not come into existence. (para 48)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu-perayu terhadap responden keempat ('responden'). Responden telah mewakili dirinya dan penduduk-penduduk rumah panjang, Rumah Siew, di mana satu tindakan telah difailkan di Mahkamah Tinggi terhadap perayu-perayu berkenaan pelanggaran hak adat anak negeri responden ke atas sebidang tanah ('tanah'). Mahkamah Tinggi telah menolak tuntutan

responden pertama dan penghakiman diberikan bagi pihak responden keempat. Tiada perintah spesifik diberi atau dibuat terhadap responden-responden kedua dan ketiga. Perintah yang dituntut, antara lain, adalah, (i) deklarasi bahawa responden mempunyai hak tanah adat dan/atau hak adat anak negeri terhadap keseluruhan kawasan Lot 13; (ii) deklarasi bahawa perayu pertama dalam Rayuan Sivil No. Q-02-661-03-2012, iaitu, Rosebay Enterprise Sdn Bhd dan/atau pekerja-pekerja atau agennya telah mencerobohi tanah adat anak negeri responden; dan (iii) deklarasi bahawa pajakan negeri bagi Lot 13 yang diberi oleh perayu-perayu pertama dan kedua dalam Rayuan Sivil No. Q-01-138-03-2012, iaitu, Penguasa Jabatan Tanah dan Ukur Bahagian Sibu dan Kerajaan Negeri Sarawak masing-masing, adalah tertakluk kepada hak tanah adat dan/atau hak adat anak negeri responden atas tanah adat anak negeri. Adalah dihujahkan bahawa pajakan sementara Lot 13 telah menjejaskan dan merangkumi tanah adat anak negeri responden. Isu-isu yang dibangkitkan untuk pertimbangan di sini adalah berkaitan dengan: (a) pengenalan kawasan tanah hak adat anak negeri yang dicerobohi; (b) *bona fide* tuntutan hak kepada hak adat anak negeri; (c) sama ada hak tanah anak negeri adalah hak kepada tanah di mana hak tersebut telah dilaksanakan; dan (d) di mana relevan, apakah hak adat anak negeri yang boleh diperolehi terhadap tanah yang dituntut. Adalah dihujahkan bahawa Rumah Siew dan kawasan yang dibersihkan dan ditanam terletak di luar dan beberapa kilometer dari Lot 13.

Diputuskan (menolak rayuan)
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Peta menunjukkan bahawa Lot 13 terangkum dalam tanah hak adat anak negeri. Kawasan yang dicerobohi telah dikenalpasti dalam penyata tuntutan di bahagian bawah tanah di mana tuntutan bagi hak adat anak negeri dibuat. Iban adalah keturunan anak negeri Sarawak. Walaupun responden diletakkan kepada bukti ketat, beliau telah mara ke depan dan cabaran telah diabaikan. Adalah wajar untuk menganggap bahawa memandangkan responden telah mara ke depan, mempunyai kad pengenalan Malaysia yang tidak dicabar, hujahannya bahawa dia dan penduduk-penduduk yang diwakili olehnya adalah Iban dan anak negeri Sarawak diterima. Sebaik sahaja ia telah ditunjukkan bahawa mereka adalah orang Iban dan anak negeri Sarawak, maka tuntutan mereka terhadap hak adat anak negeri bukanlah sesuatu yang luar biasa.

(2) *Temuda* rumah panjang Iban merangkumi kawasan yang dibersihkan untuk penanaman ("tanah umai") dan tanah yang dibiarkan kosong selepas penanaman, dan terma "pemakai temuda" merangkumi "pulau galau" (*Director of Forest Sarawak & Anor v. TR Sandah Tabau & Ors*; dirujuk). Gambar dari udara menunjukkan bahawa sehingga 1966, Lot 13 kekal di bawah tutupan hutan, dan tanpa adanya keterangan bercanggah, adalah selamat untuk menerima bahawa kawasan yang terangkum dalam Lot 13 kekal di bawah tutupan hutan sehingga ia dipajak kepada perayu pertama, Rosebay Enterprise Sdn Bhd. Memandangkan pulau galau adalah kawasan yang dilindung di bawah tutupan hutan untuk dituai, dikumpul atau untuk memperolehi barangan hutan, tuntutan responden bahawa kawasan di Lot 13 adalah sebahagian pulau galau adalah selaras dengan gambar dari udara yang dikemukakan oleh perayu-perayu.

(3) Kawasan pulau galau yang terangkum di kawasan terletaknya Lot 13 adalah selaras dengan tuntutan memandangkan pulau galau adalah bersebelahan dengan kawasan yang dibersihkan dan ditanam. Perayu-perayu tidak mengemukakan sebarang keterangan untuk mencabar tuntutan-tuntuan ini. Tambahan lagi, tanpa tanah tersebut, hak adat anak negeri bagi kegunaan pulau galau tidak boleh dilaksanakan lagi.

(4) Perayu-perayu gagal mengemukakan sebarang keterangan bahawa responden-responden tidak melaksanakan hak di bawah adat pulau galau ataupun sebarang hak yang dilaksanakan tidak terikat dengan tanah. Oleh itu, tuntutan terhadap Lot 13 berdasarkan adat anak negeri pulau galau adalah tuntutan hak adat anak negeri kepada tanah dan tuntutan itu telah dibuktikan atas imbangan kebarangkalian.

(5) Hak adat anak negeri untuk memperolehi tanah telah dikenali selama ini dan Negeri memberi perlindungan hak anak negeri untuk berbuat demikian. Hak yang dijamin oleh Negeri di bawah Perlembagaan bagi hak anak negeri mesti dijalankan oleh Kerajaan negeri itu. Kerajaan mesti, oleh itu, menentukan dan di mana sah, mengenali hak tersebut. Suatu tanah tanpa kediaman tidak semestinya adalah tanah Negeri dan tertakluk kepada hak adat anak negeri yang diperolehi sebelum ini dan hak adat anak negeri bagi tanah itu yang boleh diperolehi pada bila-bila masa mestilah mengikut undang-undang pada masa hak itu diperolehi.

(6) Responden telah melepaskan beban yang diletak atasnya di bawah Akta Keterangan 1950, bahawa pendudukan bermula dalam sekitar tahun 1800, suatu masa di mana tiada had masa atas pemerolehan hak adat anak negeri disebabkan pelbagai perintah, pekeliling dan Kanun Tanah Sarawak 1958 masih belum wujud lagi.

Case(s) referred to:
Attorney-General (SA) v. Corporation of the City of Adelaide [2013] HCA 3 ***(refd)***
Director of Forest Sarawak & Anor v. TR Sandah Tabau & Ors [2014] 2 CLJ 175 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102, 103

For the appellants - M/s Batternerg & Talma
For the respondent - M/s Baru Bian Advocs

[Appeal from High Court, Sibu; Suit No: 21-1-2010]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Wahab Patail JCA:

[1] The High Court in Sibu delivered its decision on 17 February 2012 in Suit No. 21-1-2010. These appeals arose therefrom.

[2] The four plaintiffs were Usang ak Labit, Luis ak Libau, Semuel ak Genta and Siew anak Libau ("first, second, third and fourth plaintiffs respectively"), suing on behalf of themselves and all other proprietors, occupiers, holders or claimants of native customary lands situated at Rh Gorai, Rh Siew, Rh Memuos, Rh Ngindang, Rh Gedong, Rh Chendoi, Rh Kuching, Rh Tabor, Rh Encharang and Rh Lipu ak Ali, c/o Rh. Uto ak Gorai, PO Box 89259, Mini Pos Selangau, Sibu Division, Sarawak.

[3] The plaintiffs named Rosebay Enterprise Sdn Bhd, the Superintendent of Lands And Surveys, Sibu Division and the State Government of Sarawak as the first, second and third defendants respectively.

[4] In that decision, the High Court dismissed the claim by the first plaintiff and judgment was granted in favour of the fourth plaintiff. No specific orders were granted or made against the second and the third plaintiffs. We reproduce below the orders made by the High Court:

1. The 1st Plaintiff's claim be dismissed with cost;

2. A declaration that the 4th Plaintiff has native title and/or native customary rights and/or usufructuary rights over the entire area of land now covered by Lease of State Land Lot 13;

3. A declaration that the 1st Defendant and/or its servants or agents had trespassed upon the 4th Plaintiff's native customary land;

4. A declaration that the Lease of State Land Lot 13 by the 2nd and 3rd Defendants is subjected to the native title and/or native customary rights and/or usufructuary rights of the 4th Plaintiff in or over the native customary land;

5. That the 1st Defendant and/or its employees, servants, agents to be restrained from trespassing, clearing, using or occupying the 4th Plaintiff's native customary land;

6. That the 4th Plaintiff be given forthwith vacant possession of their native customary land;

7. Damages to be assessed by the Deputy or Senior Assistant Registrar in the Plaintiffs' native customary land;

8. Costs be to the 4th Plaintiff; and

9. Costs be to the 1st, 2nd and 3rd Defendants against the 1st Plaintiff.

[5] Against that decision, Rosebay Enterprise Sdn Bhd ("first appellant") filed Civil Appeal No: Q-02-661-03/2012 and the Superintendent Of Lands And Surveys, Sibu Division ("second appellant") and the State Government of Sarawak ("third appellant") filed Civil Appeal No: Q-01-138-03/2012; and we refer to the appellants hereafter by these descriptions separately and as "appellants" collectively.

A **The Appeals**

[6] At the appeal, this court was informed that the second and third appellants had filed discontinuance against the first, second and third respondents since no orders had been granted in their
B favour.

[7] The remaining respondent in appeal No. Q-01-138-03/2012 is therefore fourth respondent Siew ak Libau. This is also correct for the first appellant in Civil Appeal No. Q-02-661-03/2012.

C **Basic Approach To NCR Cases**

[8] As is evident, Suit No. 21-1-2010 concerns a claim of a breach of native customary rights ("NCR") over land. Between the denial of a native's NCR right to land, to whom it is not mere
D asset but upon which his livelihood depends, and protecting the state from being made the victim of a false claim, these cases require anxious consideration to avoid mis-appreciation of the facts and thus injustice to one party or the other.

E **[9]** Without a structured and systematic approach, the adversarial type of litigation descends from the level of persuasion towards a detached and objective appreciation of facts and evidence and decision on the NCR claim in accordance with law as submissions to a court of law and justice ought to be, into an
F *imbroglio* of effective sounding argument but which offers no assistance towards determination of facts correctly. This is particularly important to prevent the claims to native customary rights over land from being exploited for collateral purposes against the authorities who act as the executive arm of the State of
G Sarawak.

[10] It is best, therefore, in NCR cases to approach such a claim broadly in the following steps:

(a) the identification of the area of alleged encroachment into the
H land over which NCR over land ("NCR land") is claimed;

(b) the *bona fides* of the claim to the NCR right;

(c) whether the particular NCR right relied upon is a right to the land over which the right is exercised; and,
I

(d) where relevant, what was the NCR right to land that can be acquired.

[11] The reasons are:

(a) If the area of alleged encroachment is not or cannot be identified, there is nothing to be considered as possible encroachment.

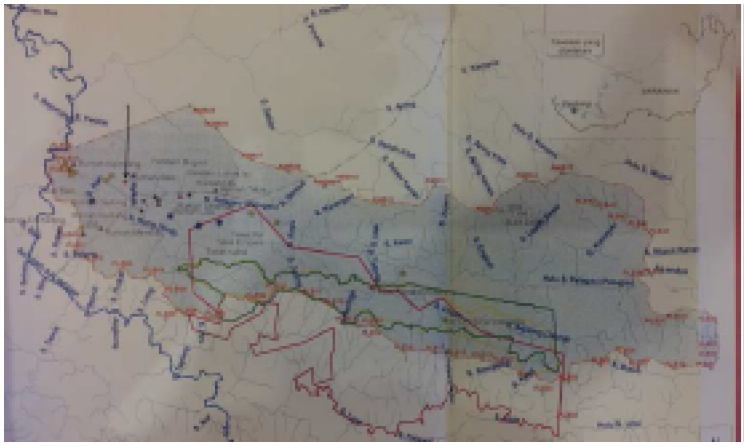
(b) If the claim made is not *bona fide*, for example it is false or purely opportunistic, or that he does not belong to a race that is native to Sarawak, there can be no basis for any claim of any NCR right over land.

(c) Given that native customary rights could range between communal, familial and individual on the one hand, and on the other, to the right to pass and repass through land, right of access to land for various purposes and rights to land cleared and cultivated. If the right is one that can be separated from the land over which it is exercised, it cannot be a right to the land.

(d) The NCR right over land that can be acquired under the laws of Sarawak was varied over time as the law was changed.

Identification Of The Area Of Alleged Encroachment

[12] In Suit No. 21-1-2010, a map of the area was appended to the statement of claim. We reproduce it below:



[13] Objection was made that it was not a licensed surveyor and should not be used. We are of the view it is to illustrate the statement of claim, and at the end of the day, the map is not contradicted by the aerial photographs below when maps were superimposed by the appellants.

[14] The largest shaded area covers approximately 11,822.26 hectares. This is the area over which the NCR claim over land is made. The land comprised in the next smaller and somewhat angular boundary on the map was comprised in a provisional lease of Lot 3 Pelugau Land District. This was later cancelled and replaced with a provisional lease of the land in the smallest of the three areas marked on the map. That provisional lease was described as a lease of Lot 13 Pelugau Land District ("Lot 13") finally issued to the first appellant covering about 4270 hectares.

[15] The first appellant is the registered holder of Lot 13. The plaintiffs alleged that the provisional lease of Lot 13 affects and cover the plaintiffs' native customary land and hence they sought the respective declarations and orders in the statement of claim.

[16] The above map shows clearly that Lot 13, with the exception of a small area in the lower corner on its left, is largely within the claimed NCR land. The area of alleged encroachment is thus clearly identified in the statement of claim to be in the lower part of the land area over which NCR is claimed. That then is the land area the subject of the appeal before this court.

The *Bona Fides* Of The Claim To The NCR Right to the Land

Status As Iban And Natives Of Sarawak

[17] The respondent and the persons he represented had asserted in the statement of claim that they were Ibans and were natives of Sarawak.

[18] From the statements of defence, some limited facts were admitted by the appellants while other assertions were denied, the plaintiffs put to strict proof. To this assertion that they are Ibans and natives of Sarawak, it was pleaded in the defence that the appellants had no knowledge and put the plaintiffs to strict proof.

[19] It is trite that denials and putting the plaintiff to strict proof does not change the standard of proof required in civil cases, which remains as upon a balance of probabilities and is upon the party who relies on that fact to succeed (ss. 101, 102 & 103 Evidence Act 1950). An assertion that is inherently improbable contributes nothing to the balance. But any evidence that is admitted into evidence, however little it may be, adds to the balance, and if there is no evidence adduced to contradict and outweigh it, it is accepted that he has discharged the burden of proof that is upon him. The key word in the phrase "balance of probabilities" is not the word "probabilities", but the word "balance". This explains the principle of the shifting of the balance, that once a plaintiff has adduced some evidence that is not incredible, the burden shifts to the other party to adduce evidence to contradict it. He needs to adduce only sufficient evidence to outweigh the evidence adduced by the plaintiff. But if he fails to do so, then the balance of probabilities is in favour of the plaintiff.

[20] It is fact that Ibans are a race native to Sarawak. The question was whether the respondent and the residents of Rumah Siew were Ibans. Examination of the testimony of the respondent who came forward to testify as PW2 shows no challenge as to whether he and the residents of Rumah Siew were Ibans or not. Thus, although the respondent was put to strict proof, he had come forward and the challenge was abandoned. Obviously, if he came forward and looked like no Iban looks-like, or he looked like an Eskimo, he would have been challenged on whether he was Iban. Therefore, it is fair to infer and conclude that since he came forward, held a Malaysian identity card, and was not challenged, his assertion he and the residents he represents are Iban and natives of Sarawak is accepted.

[21] The point is that once shown that they are Ibans and natives of Sarawak, their claim to native customary rights is not inherently incredible.

[22] In our view, there is more than sufficient evidence to establish the *bona fides* of the respondent and the residents of Rumah Siew to maintain an NCR claim as Ibans and natives of Sarawak. Whether they succeed in their NCR claim to land is a separate matter.

Locus Standi

[23] Instead, the challenge was as to the respondent's *locus standi*.

[24] The learned trial judge addressed the question of *locus standi*. The respondent herein as PW2 had admitted in cross-examination that he was only representing himself and the residents of his longhouse. The learned judge therefore did not err in holding that the respondent was not representing the other plaintiffs and the residents of the other longhouses, but was only representing himself and the residents of his longhouse, Rumah Siew.

[25] Since the litigation was commenced jointly, to exclude the claims of the other plaintiffs because they did not come forward to testify, is a mechanical application of the law of evidence. This was compounded by the error of not asking the respondent whether he knew the other plaintiffs and that they represented the residents of the other longhouses mentioned in the claim. Be that as it may, it is irrelevant for this appeal since the first to the third plaintiffs had not appealed, and are therefore not before this court.

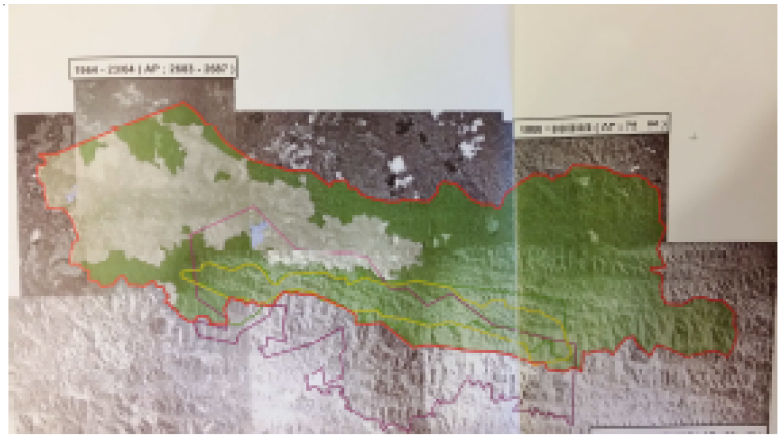
The Cleared, Cultivated And Claimed Areas

[26] Another aspect of the *bona fides* of their claim is the fact that Rumah Siew and the cleared and cultivated area are outside and some kilometres from Lot 13.

[27] The temuda of an Iban longhouse comprises cleared area under cultivation ("tanah umai") and lands left to fallow after cultivation, and the term "pemakai temuda" includes "pulau galau": see *Director of Forest Sarawak & Anor v. TR Sandah Tabau & Ors* [2014] 2 CLJ 175; Civil Appeal Q-01-463-2011.

[28] To appreciate this part of the submissions, we turned to the "Restricted. For Official Use Only" aerial photographs and superimposed maps compiled by the Director of Lands and Surveys.

[29] The aerial photograph taken in 1951 and the composite aerial photograph taken in 1963-1966 are as follows:



[30] The above two aerial photographs show enclosed in the area roughly matching the Lot 13 the area planted with oil palm. The entirety of the area in Lot 13 or planted with oil palm remained within the area claimed under NCR. The maps superimposed on the official aerial photographs taken as far back as 1951 does not conflict with the map in the statement of claim.

[31] Within the area claimed under NCR, the light area is where longhouses are located. Rumah Siew is indicated first above in the map from the statement of claim at the lower end of the vertical

line drawn. It would be within the light area in the two aerial photographs. From the scale provided on these maps, though not reproduced in the reproductions above, it is possible to estimate the distance of Rumah Siew to the nearest border of Lot 13 is about 2.5 kilometres, and to the furthest corner of Lot 13 is about 16.5 kilometres. From the right-hand most of the light area to the furthest end of the claimed NCR area on the right is about 8 kilometres.

[32] The light areas coincide with the valleys of the rivers and the streams, consistent with areas suitable for agriculture by clearing and cultivation, while higher elevations remained uncleared. The aerial photographs also show expansion of the cleared and cultivated areas between 1951 and 1966. The same photographs show the flow of rivers and streams generally from the right to the left, mute explanation as to why the cultivated and the claimed area are not in a compact formation but elongated. It was a form dictated by the topography, as Lot 13 itself is.

[33] The aerial photographs show that up to 1966 at least Lot 13 remained under forest cover, and in the absence of evidence to the contrary it is safe to accept the area comprised in Lot 13 remained under forest cover until leased to the first appellant.

[34] Bearing in mind that a pulau galau is an area maintained under forest cover in order to harvest, collect or otherwise obtain forest products, the claim by the respondent that the area in Lot 13 is part of their "pulau galau" is not inconsistent with the official aerial photographs produced by the appellants. The location of the claimed pulau galau area within which Lot 13 is located is not inconsistent with the claim since the pulau galau area is adjacent to the cleared and cultivated areas. No evidence was produced by the appellants to contradict these claims and evidence. In the circumstances, it must be held that they had so proved upon a balance of probabilities and have discharged the burden placed upon them under the Evidence Act 1950.

Whether The NCR Right Claimed Is A Right To The Land

[35] A distinction was sought between a native custom and customary right to land.

[36] We accept that the term native custom is a wide term that include native social customs. We accept as reasonable also that social customs are not necessarily related to land.

[37] The NCR claim to the area in Lot 13 not as a native social custom, or custom of "pemakai umai" and/or cultivated land left to fallow, but under the native custom of "pulau galau", of setting aside an area, in this case, under the custom of the Ibans, under forest cover from which they derive various forest produce and products.

[38] What is pulau galau has been explained by this court in *Director of Forest Sarawak & Anor v. TR Sandah Tabau & Ors* (*supra*). It is true that not all produce or products in a pulau galau are derived directly from the land. But it stands to reason that produce and products derived directly from the land, be it its mineral or formation such as caves or cliffs for birds' nests, necessarily means it is a right related to land for without the land the right to the produce and products could not be enjoyed, benefited from or accessed. Equally true and for the same reason, for produce or products derived indirectly, such as woods, fruit, seeds such as engkabang or ellipe nuts, resin, vegetables, honey from beehives on tualang trees, and medicinal plants from the forest in the pulau galau. Without the land, the native customary right of the use of pulau galau can no longer be exercised. The custom of pulau galau is therefore a native custom so inextricably wrapped and tied up with the land it is upon that it is as much a native custom to land as the tanah umai and the fallow lands in the temuda. Hence, it has always been part of the native custom that the "pulau galau" is part of the menoa or pemakai menoa (also referred to as "pemakai temuda").

[39] There is no evidence adduced for its part of the scale in the "balance of probabilities" by the appellants that the respondents did not exercise any rights under the custom of "pulau galau", or that any right they exercised thereon was not inextricably wrapped and tied up with the land.

[40] We hold, therefore, that the claim to the land in Lot 13 based upon the native custom of "pulau galau" is a claim of a native customary right to land, and that the claim has been proved upon a balance of probabilities.

What Is The NCR Right To Land That Can Be Acquired

[41] The appellants submitted to this court the development of the law as to land in Sarawak from 1875 the various Orders, Circulars and Ordinances, the Tusun Tunggu to the Land Code

1958 (Sarawak Cap. 81). This was addressed in *Director of Forest Sarawak & Anor v TR Sandah Tabau & Ors* Civil Appeal (*supra*). The analysis in that case demonstrated the progressive restriction on what can be acquired under "native customary rights" until today. But through it all, native customary rights to acquire land had at all times been recognised, and the state undertook to protect the natives' rights to do so.

[42] We observe there is a clear distinction between the state being the State of Sarawak, and the Government of the State of Sarawak who is the executive arm or the custodian of the executive powers of the state which carries out the responsibilities of the state. It goes without saying that the rights guaranteed by the state under the constitution in respect of native rights must be carried out by the Government of the State. In so doing, the government must therefore determine and where valid recognise the NCR rights of the natives of the state. Likewise, the legislature of the state with regard to the laws it passes in respect of native rights. With such obligation, not only acts contrary to or in breach of the constitution null and void as being unconstitutional, but that acts in excess of the purposes may well place the government and the legislature of the state under similar attack: see as example *Attorney-General (SA) v. Corporation of the City of Adelaide* [2013] HCA 3.

[43] Returning to the instant case, and from the development of the state laws in relation to land and the recognition that land could be claimed under native customary rights, we are of the view:

(a) that land without apparent habitation is not necessarily State land and must be subject to native customary rights previously acquired thereon; and

(b) the native customary right to the land that can be acquired at any point of time must be in accordance with the law at the time the right was acquired.

[44] Now, the pleaded case per paras. 4 and 5 of the statement of claim is as follows:

> 4 (c) The Plaintiffs acquired the said rights over the said native customary lands by the following methods:
>
> (i) custom, laws, tradition and practices of the Iban community in Sibu, Sibu Division, Sarawak; and/or

(ii) by occupation of the said native customary land; and/or

(iii) by felling, clearing, using and cultivation of the said native customary lands; and/or

(iv) by all the methods as specified in the Sarawak Land Code Cap. 81;

...

5. Alternatively, the Plaintiffs aver that they have acquired the said rights in the said native customary lands by way of encouragement or assurance or guarantee and/or promises made by the 3rd Defendants and/or its predecessors to the Plaintiffs and their ancestors to settle, occupy, cultivate and use the said native customary lands in that:

(i) The 3rd Defendant and/or its predecessors had recognised, accepted and/or demarcated the communal native customary land boundary of the Plaintiffs with that of neighbouring communities.

(ii) The 3rd Defendant and/or its predecessors had and continues to grant agricultural subsidies and assistance to the Plaintiffs and their ancestors to cultivate various trees and crops over the said native customary lands;

(iii) The 3rd Defendant and/or its predecessors had and continues to appoint "Ketua Kaum/Masyarakat" (community chiefs) for the Plaintiffs' said longhouses; and

(iv) The 3rd Defendant, its agent(s) or servant(s) had and still continues to implement or provide members of the Plaintiffs' longhouses with various minor rural projects, socio-economic and infrastructural projects and services on the said native customary land.

[45] The defence of the director and the government is that no admissions are made in respect of para. 4 and the respondents were put to strict proof in respect of para. 5.

[46] The respondent Siew ak Libau gave a witness statement (as PW2) affirmed on 8 March 2011 through the interpretation of one Nicholas Bawin Anggat, before a Commissioner for Oaths. This Nicholas Bawin ak Anggat, a Deputy President of the Majlis Adat Istiadat Sarawak between 12 August 1992 until February 2005, also gave a witness statement as PW1 as an expert on Iban adat.

[47] The respondent Siew ak Libau averred in his witness statement:

> 4. The residents of Rumah Siew and Rumah Gedong, share a common origin and history. Our ancestors had settled, cultivated and/or occupied all the areas within the said NCR Land since time immemorial. We claim NCR over the said NCR land by virtue of our adat or customs as Ibans of Sarawak, which is the felling of virgin jungles, the farming of the same thereafter and the occupation of it to this day. We have never abandon our NCR over the said NCR Land we are now the 3rd and/or 4th generation since our ancestors led by their Berinau ak Bangan who with his 6 sons and a few other families first came and occupy the said NCR land from Batang Skrang.
>
> 5. Our said ancestors started occupying the said NCR land area since the late 1800s to this day. Berinau ak Bangan was my great grandfather who came with the other families to occupy the said NCR land. The first Tuai Rumah at that time was TR Dangat ak Bonsu.
>
> 6. Several old longhouses sites or "tembawai" situated around the area are; Tembawai Nitar, Tembawai Sikup, Tembawai Rantau Deras, Tembawai Gudang Garam, Tembawai Lubok Angkong, Tembawai Nanga Setawak, Tembawai Nanga Tawong dan Tembawai Nanga Lingeh.
>
> 7. I was originally from Tembawai Gudang Garam which was led by TR Dangat ak Bonsu. In the year 1975, the longhouse under was split into two; one headed by TR Gedong ak Embuas which is now living in Rumah Gedong and another group led by me which is now living in Rumah Siew.
>
> 8. The locations of these old longhouses sites or "Tembawais" are as marked in the locality sketch map marked "M" referred to above.
>
> 9. We the Plaintiffs further claim that we have acquired and/or inherited their rights, interest and title over the said NCR Land by virtue of our adat, as Ibans of Sarawak. We have been in occupation of the said NCR Land uninterrupted since our ancestors Berinau ak Bangan came to settle on the said NCR Land more than one hundred years ago.

[48] Cross-examination of PW2 was conducted by Mr George Lim for the first appellant and SLO Mr. McWillyn for the second and third appellants. We do not propose to reproduce the cross-examination. It suffices to say that though challenged in cross-examination, the witness did not concede. More importantly, no

evidence to substantiate the assertions made in the challenges during cross-examination was produced by the appellants. In the event the balance of probabilities having inclined remained inclined in favour of the respondent, and the court must conclude that the respondent had discharged the burden that is placed upon him under the Evidence Act 1950 as the plaintiff, that occupation began in the 1800s, at a time when no limitations on the acquisition of native customary rights existed because the various orders, circulars and the Sarawak Land Code 1958 had not come into existence.

[49] For the foregoing reasons, we dismiss the appeal with costs fixed, unless otherwise agreed, in the sum of RM10,000 by the first appellant, and the second and third appellants respectively.